IN THE

Supreme Court of the United States

October Term, 1957

No. 133

PARRIS SINKLER, *Petitioner*

v.

MISSOURI PACIFIC RAILROAD COMPANY, *Respondent*

RESPONDENT'S BRIEF

ROY L. ARTERBURY
WALTER F. WOODUL
1828 Bank of the Southwest Bldg.
Houston 2, Texas

PALMER HUTCHESON, JR.
Esperson Bldg.
Houston 2, Texas

ALPHA LAW BRIEF CO., 402 M & M BLDG., HOUSTON 2

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RESPONDENT'S BRIEF

Questions Presented

Respondent takes exception to the Statement of Petitioner as to the Questions Presented. The Questions Presented are:

(1) Is Respondent liable under the Federal Employers Liability Act, 35 Stat. 65, 66, 45 U.S.C., Sec. 51, et seq., to its employee for an injury received by the employee, while working in the course and scope of his employment with Respondent, due to the negligence of an independent contractor.

(2) Did the contract between Respondent and Houston Belt & Terminal Railway Company fall within the prohibition of Section 5 of the Federal Employers Liability Act, 35 Stat. 66, 45 U.S.C., Sec. 55.

(3) Was there sufficient evidence to support the jury's finding that Houston Belt & Terminal Railway Company was the Agent of Respondent on the occasion in question.

While Petitioner's statement is substantially correct, save for a few unwarranted conclusions which he drew, Respondent submits that it is not complete. Respondent therefore submits the following additional statement.

The Houston Belt & Terminal Railroad Company (hereinafter referred to as H.B.&T.), is a Texas Corporation, organized in 1905 (R. 52) which among, other things, does all the switching of passenger cars for Respondent, Gulf Colorado & Santa Fe Railway Co., The Ft. Worth and Denver Railway Co. and the Rock Island Lines, at Houston. (R. 41). On the occasion in question, and for many years prior thereto Respondent owned 50% of the capital stock of the Houston Belt and Terminal Railroad Co.,[1] Gulf Colorado & Santa Fe Railway owned 25% of such stock, Ft. Worth & Denver Railway Company owned 12½% and the Rock Island Lines owned 12½%. (R. 39). The H.B.&T. owns Union Station (in Houston, Texas),

[1] At the time of the accident the stock of the Respondent was owned by Guy A. Thompson, Trustee of the Beaumont, Sour Lake & Western Railway Company and St. Louis, Brownsville & Mexico Railway Company. Since such time the Trusteeship of Guy A. Thompson has been terminated and all assets of the said Guy A. Thompson, Trustee of the Beaumont, Sour Lake & Western Railway Company and the St. Louis, Brownsville & Mexico Railway Company have been acquired by Respondent.

(R. 54), and the equipment it uses in its operation of the facilities. (R. 55). The H.B.&T. operates as a terminal and switching carrier, and it has tariffs on file which have been approved by the Interstate Commerce Commission and the Texas Railroad Commission. These tariffs apply to movements of cars other than those moved under the contract between H.B.&T. and Respondent and Gulf Colorado and Santa Fe and Burlington-Rock Island. (R. 55).

The H.B.&T. employs and discharges its own employees; (R. 56), it has contracts with various labor organizations; under these contracts its employees have their own seniority rights; (R. 57), the switch engines are operated by employees of the H.B.&T. (R. 57); the crews of the switch engines receive their instructions from the H.B.&T. Yardmaster. (R. 58).

The procedure followed with reference to making expenditures for improvements was for the H.B.&T. management to determine the cost and submit the matter to the H.B.&T. executive committee, which was composed of members of the H.B.&T. Board of Directors. (R. 60). In making settlement of claims made by its employees the H.B.&T. management can make settlements up to a certain amount, but if it is a substantial settlement the matter must be passed upon by the executive committee. (R. 99).

The H.B.&T. performs switching for the Southern Pacific Lines and the Missouri-Kansas-Texas Railroad Company to industries located on the H.B.T. lines. (R. 73). The H.B.&T. also switches cars to and from industries. (R. 96). These charges are covered by regularly filed tariffs. (R. 96). The charges made to Respondent, Gulf Colorado & Santa Fe and Burlington-Rock Island for the services performed

for them by the H.B.&T. are in proportion to the number of cars handled into and out of the passenger station for each line. (R. 56).

One portion of the contract, in effect on the occasion in question, read as follows:

> "The Terminal Company shall have the *exclusive* management and *control* of the *operation, maintenance, repair* and *renewal* of the Terminal facilities and every part thereof, and shall establish rules and regulations governing the operation of trains within and upon the Terminal facilities and the use and enjoyment thereof in all other respects; provided, always, that such rules and regulations shall be fair and equitable and shall apply equally and without discrimination to all the railway companies using the terminal facilities. The railway companies agree to comply and cause their employees to comply with such rules and regulations." (Emphasis ours)

Summary of Argument

A. The Federal Employees Liability Act creates liability on the part of the carrier *only* for injury resulting in whole or in part from the negligence of any "of its officers, agents, or employees of such carrier." The injury in question resulted from the negligence of an independent contractor and hence not from an *officer, agent, or employee* of the carrier: *Robinson v. Baltimore & O. R. Company,* (Sup. Ct. 1915) 737 U. S. 84, 59 L. Ed. 849; *Hull v. Philadelphia & Reading Railway Company* (Sup. Ct. 1920) 252 U. S. 475, 40 Sup. Ct. 358, 64 L. Ed. 670. One common carrier can contract with another to provide an ancillary specialized service. *Gaulden v. So. Pac. Co.* (1948) 78 F. Supp.

651, aff'd 174 F. 2d 1022; *Moleton v. Union Pacific R. R. Company, et al* (Utah, 1950) 219 P 2d 1080, Cert. Den. 340 U. S. 932, 95 L.E.D. 672, 71 Sup. Ct. 495.

B. Section 5 of the Act (45 U.S.C. Sec. 55) is not applicable to this case. Section 5, by its own wording, only applies where some contract or rule is designed to defeat liability created by the act. That isn't the situation in the instant case because the act did not create liability upon the carrier for the negligence of independent contractors.

C. H.B. & T. on the occasion in question, was acting in its usual and consistent role as an independent contractor, and not as Respondent's agent. H.B. & T., and not Respondent, had full and complete control of the premises and switching operations and Respondent had divested itself of the right of control, in that it had no longer a right to terminate the work or direct it. *Cimarelli v. New York Central Railroad Company*, (Ct. Appeals, 6th Cir., 1945, 148 F. 2d 575).

Argument

I.

Respondent is not liable to Petitioner for the injury in question simply because the injury was not caused by Respondent or any of its agents, servants, or employees.

Petitioner's contention under this argument is that conceding the H.B. & T. to be an independent contractor and hence its agents, servants, and employees are not the agents, servants, and employees of Respondent, still Respondent is liable for the negligence of the employees of the H.B. & T. under the provisions of the Federal Employers' Liability Act.

This contention is made without any finding or allegation that Respondent was negligent in selecting the H.B. & T. as the Company to do its switching and without any allegation or finding that the H.B.&T. was not competent in this respect.

Petitioner's contention is not tenable. It ignores not only the very wording of the Act but also the pertinent cases construing the Act. The Act reads as follows (45 USC, Sec. 51):

> "Every common carrier by railroad while engaging in commerce between any of the several states or territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from *the negligence of any of the officers, agents, or employees of such carrier. . .*" (Emphasis ours).

The wording of the Act is plain. It specifically provides that the carrier will be liable for injuries resulting from *"the negligence of any of the officers, agents, or employees of such carrier."* It does not make the carrier responsible for all injuries sustained by its employees while working in the course and scope of their employment. Liability on the part of the carrier is conditioned upon negligence on the part of the officers, agents, or employees of such carrier. Absent that condition, there is no liability on the part of the carrier under the Act.

The cases have uniformly adhered to the plain wording of the Act. In the cases of *Hull v. Philadelphia & Reading Railway Company* (Sup. Ct., 1920), 252 U. S. 475, 40 Sup. Ct. 358, 64 L. Ed. 670, *Linstead v. Chesapeake & Ohio*

Railway Company (Sup. Ct. 1928) 276 U. S. 28, 72 L. Ed. 453, and *Robinson v. Baltimore & Ohio Railway Co.*, (Sup. Ct. 1915) 59 L. Ed. 849, 737 U. S. 84 this very point was decided.

In the first of these three cases, *Robinson v. Baltimore & Ohio R. Co. Supra* the precise issue before the Court was whether a Pullman Porter, in the employ of the Pullman Company, was an employee of the Railroad Company within the meaning of the Act. The Court held that the Pullman Porter could not be considered as an employee of the Railway Company so as to bring him within the purview of the Act. At p. 853 of 59 L. Ed., the Court, in the course of its opinion, stated:

> "We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their natural sense, *and intended to describe the conventional relation of employer and employee.* It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such person among those to whom the Railway Company was to be liable under the Act."

We respectfully ask the Court to bear in mind that the Court in the above case expressly holds that Congress used the words "employee" and "employed" *in their natural sense* "and *intended to describe the conventional relationship* of employer and employee." (Emphasis ours). We ask the Court to bear in mind further that the Act makes no distinction in the meaning of the term "employee" in describing the injured party and in describing the "party" causing the injury. Thus the holding of the Court in the

Robinson Case, Supra, is that not only must the injured party be an employee of the carrier but also that the negligent party must also be an officer, agent, or employee of such carrier.

The *Robinson Case, Supra,* was decided in 1915, some 43 years ago. Congress has been in session many times since that decision and had not seen fit to amend the Act. Such fact certainly argues persuasively for the conclusion that the Court correctly interpreted the Act.

The *Robinson Case, Supra,* was followed by the *Hull Case, Supra.* In the *Hull Case, Supra,* the deceased, Hull, was an employee of the Western Maryland Railway Company. He was engaged in operating a Western Maryland train on a run which was partly over the tracks owned by the defendant, Philadelphia & Reading Railroad Company. While operating on the Reading tracks, Hull was killed due to negligence of a locomotive engineer employed by the defendant. At the time Hull was killed, his train had stopped pursuant to instructions given by an employee of the defendant Company. The plaintiff took the position that Hull was an employee of the defendant company. The Court in overruling this contention stated, at p. 673 of 64 L. Ed.,

> "We hardly need repeat the statement made in Robinson v. Baltimore & O. R. Co., 237 US 84, 94, 59 L. Ed. 849, 853, 35 Sup. Ct. Rep. 491, 8 N.C.C.A. 1, that in the Employers' Liability Act Congress used the words "employee" and "employed" in their natural sense, and intended to describe the conventional relation of employer and employee. The simple question is whether, under the (480) facts as recited and according to the general principles applicable to the relation,

Hull had been transferred from the employ of the Western Maryland Railway Company to that of defendant for the purposes of the train movement in which he was engaged when killed. He was not a party to the agreement between the railway companies, and is not shown to have had knowledge of it; but, passing this, and assuming the provisions of the agreement can be availed of by petitioner, it still is plain, we think, from the whole case, that deceased remained for all purposes — certainly for the purposes of the act — an employee of the Western Maryland Company only. It is clear that each company retained the control of its own train crews; that what the latter did upon the line of the other road was done as a part of their duty to the general employer; and that, so far as they were subject while upon the tracks of the other company to its rules, regulations, discipline, and their orders, this was for the purpose of co-ordinating their movements to the other operations of the owning company, securing the safety for all concerned, and furthering the general object of the agreement between the companies. See Standard Oil Co. v. Anderson, 212 U. S. 215, 226, 53 L. Ed. 480, 485, 29 Sup. Ct. Rep. 252."

The last of this trio of cases, the *Linstead Case, Supra,* involved an action by an Administratrix for the wrongful death of Linstead, who was killed due to the negligence of the defendant, Chesapeake & Ohio Ry. Co. Linstead, at the time he was killed, was a member of a switch crew employed by the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, working in the terminal yard of the Chesapeake & Ohio. The Chesapeake & Ohio and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company exchanged traffic in this terminal yard, which consisted of some 12-13 miles of track. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company lent a loco-

motive, caboose and train crew to the Chesapeake & Ohio yard to take freight trains going to the Cleveland, Cincinnati, Chicago & St. Louis yard at Riverside, Ohio, from a point in the Chesapeake & Ohio Terminal yard, some 12-13 miles, to the Cleveland, Cincinnati, Chicago & St. Louis tracks. It was while engaged in this work that Linstead was killed. The Court in considering this point (P. 456 of 72 L. Ed.) stated that the deceased was doing the work of the defendant (Chesapeake & Ohio Ry. Co.) and the defendant had the right of control.

The rationale and holding of the Supreme Court in the above cases makes it clear beyond doubt that the Federal Employer's Liability Act is applicable only when the negligent party is an officer, agent, or servant of the employing carrier. In the *Robinson Case, Supra,* the Court, speaking through Justice Hughes, specifically said that Congress used the word "employee" in its natural sense. It necessarily follows that the carrier is not responsible for the negligent acts of the employees of an independent contractor, since the employees of the independent contractor are not employees of the carrier within the natural sense of the word "employee". In both the *Hull Case, Supra,* and the *Linstead Case, Supra,* the Court went into great detail to examine whose work was being done by the deceased and who had the right of control. In the *Hull Case, Supra,* the Court found that he was not doing the work of the negligent party and the negligent party did not have the right of control and hence, the Court denied a recovery. In the *Linstead Case, Supra,* the Court felt that the deceased was doing the work of the negligent party, and also that the negligent party had the right of control and hence, it upheld a recovery. In subsequent pages of this brief, we will show that the switching crew in question was not

doing Respondent's work and Respondent did not have the right of control. The point we wish to make here is that all three of these cases are directly contrary to Petitioner's position on this point. One case specifically says there must be an employer-employee relationship and the other two cases hold that there must be an employee relationship—at least at the particular time in question. Absent such relationship, there can be no recovery.

Petitioner many contend that the question of assignability or delegation of some of the ancillary functions of a common carrier were not involved in the above cases. Such contention will overlook the salient facts present in those cases. In the *Robinson Case, Supra*, the plaintiff's contract of employment was with the Pullman Company. Certainly his duties on the train were in the furtherance of interstate commerce. The Supreme Court in that instance refused to hold the Act applicable. Such refusal is tantamount to holding that while the work being done is for the ultimate benefit of the Railway Company, still if it is done under the direction and supervision of another master, the doing of such work does not make the man the employee of the carrier. This principle is expressed in the case of *Standard Oil v. Anderson* (Sup. Ct.) 212 U.S. 215, 29 S. Ct. 252, 53 L. Ed. 480.

In the *Hull Case, Supra*, the Western Maryland Co., with whom deceased had his contract of employment, was operating its train, pursuant to a contract over the tracks of the defendant. The plaintiff contended that since the Philadelphia & Reading had the non-delegable duty to operate its road, and since Hull, an employee of the Western Maryland, was operating on the road of the Philadelphia & Reading, he was performing a non-delegable duty with

the knowledge and assent of the Philadelphia & Reading, and hence he was an employee of the Philadelphia & Reading. Such contention is shown at P. 671 of 64 L. Ed. The Court in its opinion ignored this argument and based its decision on the question of control. Likewise the Court in the *Linstead Case, Supra,* based its decision on the question of control. See 72 L. Ed. Pgs. 455-6. Accordingly, Respondent submits that both of these cases are directly contrary to Petitioner's position under this point.

Subsequent cases which support Respondent have followed the above quoted cases.

The case of *Louisville & N. Railway Co. v. Wingo's Administratrix* (Kentucky, 1926) 281 S.W. 171, was an action for damages under the Federal Employer's Liability Act for the wrongful death of Wingo, a car inspector employed by the Defendant, who was killed when a switch engine owned by, and being operated by employees of, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, undertook to switch the dining car he was inspecting. The trial Court had sustained a demurrer to defendant's amended answer and such action had been assigned as error. The Court in disposing of such contention stated:

> "The answer does not set forth the terms and conditions under which the lessor was to furnish all employees for the joint service. Construed in connection with the petition, it impliedly admits that the employees engaged in switching and coupling the diner were serving appellant only at the time of the injury. While it is alleged that the instrumentalities by which the diner was being moved were under the exclusive control of the lessor, there is no allegation that the members of the switching crew were subject to the

sole control of the lessor, or that they were not subject to the direction of appellant. We need not discuss the various tests for determining when the relation of master and servant exists. Here the switching crew sometimes served the Pennsylvania Company. At other times as on the occasion in question they served appellant. *In a case of this kind the question of control is of paramount importance.* In the absence of a showing that while serving appellant, they were under the sole direction and control of the lessor, the members of the crew must be regarded for the time being as the employees of appellant. Atlantic Coast R. Co. v. Treadway, 93 S.E. 560, 120 Va. 735, 10 A.L.R. 1411; Floody v. Great Northern Ry. Co. & Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 112 N.W. 875, 102 Minn. 81, 13 L.R.A. (N.S.) 1196. It follows that the Court did not err in sustaining the demurrer to the second paragraph of the amended answer." (Emphasis ours).

The most recent case we have been able to find on this point is the case of *Moleton v. Union Pac. RR. Co., et al.* (Sup. Ct. Utah, 1950) 219 P. 2d 1080, Cert. denied, 340 U.S. 932, 95 L. Ed. 672, 71 S. Ct. 495). In that case the plaintiff's contract of employment was with the Pacific Fruit Express Company. The plaintiff was injured while working in the yards of the defendant, Union Pacific R.R. Co., at Laramie, Wyoming, servicing a car, owned by the Fruit Growers Express, which was being hauled in a train by defendant, Union Pacific. The plaintiff contended that since he was performing the work of the Railroad Company, the provisions of the F.E.L.A. were applicable. The Court in deciding the issue went into great detail to examine the question as to who had control of the work. The Court found that the Railroad Company did not have

the requisite control and hence denied the claimant a recovery. The *Moleton Case* is strong and persuasive authority for respondent's position in this case at bar.

The switching of Railway cars in larger cities has become a specialized service which is ordinarily performed by a terminal company and not by the Railroad Company which brings the car into the city. See the cases of *Fort Worth Belt Railway Company v. United States* (Ct. Appeals 1927) 22 F. 2d 795, which sets out the activities of the Fort Worth Belt Railway Company, and *Terminal Railway Association v. U. S.* (S. Ct.) 266 U.S. 18, 69 L. Ed. 150, which describes the activities of the Terminal Railway Association of St. Louis. In this case the testimony of the witness Magee, shows that the Interstate Commerce Commission makes a distinction between switching carriers and Line Haul carriers, when he testified (S.F. P. 157) that the Houston Belt and Terminal Railway Company is classified as Class I among switching carriers by the Interstate Commerce Commission.

In addition to the foregoing, our Legislature has enacted a provision expressly authorizing the organization of Terminal Railway Companies. See Art. 6549 of Vernon's Annotated Texas Statutes which reads, in part, as follows:

> "Terminal railways shall have all the rights and powers conferred upon railroads by Chapters 6 and 7 of this title. . ."

Also Sections 67 and 72 of Article 1302 Vernon's Civil Statutes of the State of Texas, Annotated, authorize the creation of private corporations for the purpose of construction, operation, and maintenance of terminal railways.

From the foregoing it will be noted that both the Texas Legislature and the Interstate Commerce Commission recognize the distinction between Terminal Railways and Railroads whose tracks go from city to city. Recognizing this distinction our legislature has authorized the creation of corporations to perform the services of a terminal railway company. There has been no limitation put upon the power of terminal railway companies to contract with other railroad companies.

The cases have held, uniformly, that where a railroad company utilizes the services of another company, also a common carrier, for a special service, the employees of the other company are not the employees of the Railroad Company within the terms of the Federal Employer's Liability Act. The *Moleton Case*, *Supra*, is an example of that principle. Surely in that case the servicing of the cars which were in the defendant's train was as much a performance of the functions of a common carrier as was the switching of the private Railway car on the occasion in question. Yet the plaintiff, in the *Moleton Case*, *Supra*, was denied a recovery because the element of agency was lacking. He was working for an independent contractor and hence not an employee of the Railway Company. The *Robinson Case* *Supra*, is another example of this principle. Certainly the attending upon passengers, in a passenger train, whether they are Pullman passengers or coach passengers, is as much a performance of the functions of a common carrier as was the switching of the car in the instant case. Yet the Court denied a recovery in the absence of facts showing an agency relationship. The *Hull Case* and the *Linstead Case*, *Supra*, are also examples of this principle. In the *Hull Case*, *Supra*, the element of control was lacking and hence the

Supreme Court denied a recovery while in the *Linstead Case, Supra,* the element of control was present and hence the Supreme Court upheld a recovery. The case of *Wingo's Administratrix, Supra,* is another example. In that case the switching of the cars was as much the function of a common carrier as was the switching of the car in the instant case. In that case the Court upheld a verdict for the plaintiff because the element of control was present.

These cases show clearly that a carrier is not responsible for the acts of the employees of an independent contractor when such contractors are engaged in the performance of switching operations.

The cases relied upon by Petitioner are either not in point or have been discredited.

The *Shelton* case cited on pages 10 and 11 of Petitioner's Brief is not in point. Petitioner urged that case in his brief before the Texas Court of Civil Appeals and the Texas Supreme Court. On each occasion Respondent has pointed out the distinction between the *Shelton* case and the instant case. Since the *Shelton* case was decided by the Supreme Court of Texas and this case was passed upon by that Court we submit that the distinction is a valid one. Certainly the Supreme Court of Texas would not have allowed the judgment of the Court of Civil Appeals in this case stand if such had been contrary to the holding of the Supreme Court in the *Shelton* case.

The distinction between this case and the Shelton case is just simply that there was no showing in the *Shelton* case, as there is in the instant case, that the Defendant did not exercise any control over the switch crew of the H.B.&T., the crew causing the injury. Under Texas law if the Defendant, as in the *Shelton* case, had the right of control

over the switch crew, it would be responsible for the negligence of the crew. *G. C. & S. F. Ry. Co. v. Dorsey;* 66 Tex. 148.

We respectfully submit that the *Shelton* case, Supra, is not any authority for Petitioner's position in this case.

The reasoning of two of the other cases upon which Petitioner relies *Floody v. Great Northern Ry. Co. & Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 102 Minn. 81, 112 N.W. 875, 13 L.R.A. (U. S.) 1196 (cited on pp. 9 and 10 of Petitioner's Brief) and *Atlantic Coast Line Ry. Co. v. Treadway*, (cited p. 9 of Petitioner's Brief), 120 Va. 735, 935 S.E. 560, 10 A.L.R. 1411 have been discredited by the United States Supreme Court in the case of *Hull v. Philadelphia & Reading Railway, Supra,* (64 L. Ed. 670), discussed earlier in this Reply. In the *Hull* case the plaintiff argued that since the Railway Company had the nondelegable duty of the operation of its road (citing *Central Transportation Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. Ed. 55), the plaintiff was an employee of the Reading Company since he was performing a nondelegable duty for the Reading Company, citing the *Treadway Case, Supra.* This argument is shown at the top outside column on p. 671 of 64 L. Ed. The Supreme Court ignored this contention and decided the case on the element of control. Not even the dissenting opinion considered the contention worthy of mention. It only differed with the majority in that it thought the necessary control was present. Since the reasoning of the *Treadway Case, Supra,* has been discredited by the United States Supreme Court and since the *Floody Case, Supra,* is based upon the same reasoning we respectfully submit that they are not any authority for Petitioner's position in this case.

Similarly the quotation from the Restatement of Torts (cited on p. 11 of the Brief) do not support Petitioner's position. The rule stated there relates to a delegation to a person or firm other than a common carrier. The *Hull Case, Supra,* the *Moleton Case, Supra,* and the *Robinson Case, Supra,* are contrary to the rule laid down in those authorities when applied to the facts in the instant case.

It should be remembered that the construction given the act in the *Robinson, Hull & Linstead cases* has withstood the test of time. Congress, even though it amended the act in 1939, has not shown any inclination to enlarge the category of the parties for whose act a carrier is liable. Petitioner's argument at the bottom of Page 13 of his brief that the phrase which Congress used in designating the parties for whose acts the carrier is responsible — its "officers, agents or employees" — is as broad as Congress could have used is obviously incorrect. Congress could have made the carrier liable for all injuries received by its employees while working in the scope of their employment. However, Congress did not do so. It limited the liability of the carrier to the negligent act of its "officers, agents and employees" — persons whose conduct the carrier could control.

The Court, in the case of *Gaulden v. Southern Pacific Company,* 78 F. Supp. 651 (Dist. Ct. 1951) aff'd 174 F. 2d 1022 very amply stated at Page 654:

> "The remedial and humanitarian purposes of the Employer's Liability Act in no way compel an interpretation of the contract in favor of an employment or agency relationship. It is not amiss to point out that Petitioner is not without redress for his injuries. * * * It is not for the Courts to extend the coverage of the Liability Act into new fields.

II.

Section 5 of the act (45 U.S.C., Sec. 55) is not applicable to the case.

Section 5 of the Act is quoted on page 15 of Petitioner's Brief and provides that "any contract * * * the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Chapter, shall * * * be void. * * *" Section 5 is not applicable to this suit. It provides that contracts the purpose of which is to exempt a carrier from liability created under the Act are void. The Act did not create liability upon the carrier for the negligence of the employees of its independent contractors. The Act only creates liability upon the carrier for the negligence of its "officers, agents and employees." It is not responsible for the acts of an independent contractor, with whom it has a right under the law to contract. Section 5 only applied to instances where the carrier would be responsible to the employee under the terms of the Act but for a "contract or rule" by which the carrier sought to exempt itself from liability. In such instance the contract or rule is void. That isn't the situation in this case. Respondent is not responsible to Petitioner in this case because of the legal relationship between itself and the H.B.&T. It is not relying upon any "contract — the purpose or intent of which shall enable" it to exempt itself from any liability created by the Act.

In the case relied upon by Petitioner in his Brief, *Philadelphia, Baltimore & Washington RR. Co. v. Schubert*, 224 U. S. 603, 56 L. Ed. 911, the court had under consideration a contract between a carrier and its employee which provided that the company should deduct the sum of $2.10 from the employee's wages each month to be

placed in a relief fund. The contract further provided that in case of injury the acceptance of benefits from the relief fund would constitute a release from the assertion of a claim or institution of a suit would bar any further payments from the fund. Justice Hughes had this contract before him when he made the remarks quoted on page 16 of Petitioner's Brief. At page 916, the court stated:

> "The statute (45 U.S.C.A. 51) provides that 'every common carrier * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. * * *' That is the liability which the Act defines and which this action is brought to enforce. It is to defeat that liability for the damages sustained by Schubert which otherwise the company would be bound under the statute to pay, that it relies upon his contract of membership in the relief fund, and upon the regulation which was a part of it. But for the stipulation in that contract, the company must pay; and if the stipulation be upheld, the company is discharged from liability. The conclusion cannot be escaped that such an agreement is one for immunity in the described event, and as such it falls under the condemnation of the statute."

This Honorable Court will note that Justice Hughes is holding that the contract in question is one of immunity. Manifestly, that isn't even slightly similar to the contract in the instant case. The Petitioner cites not one single case to support his contentions under this point. The cases of *Moleton v. Union Pacific RR. Co., Supra,* and *Gaulden v. Southern Pacific Co.,* 78 Fed. Supp. 651 (1948); affirmed 174 F. 2d 1022 support Respondent's position. The fact situations in those cases are very similar to the instant case.

We submit that the record in this case wholly fails to show that the Houston Belt & Terminal Railway Company was used by Respondent "as a device to obtain the forbidden end." *Gaulden v. Southern Pacific Company, Supra.* Just as in the *Moleton Case, supra,* no one concerned with the operation of the Terminal thought the railroad was performing the services, and merely took on the Terminal company for the purpose of acquiring the use of their employees.

III.

There was no evidence to support the finding of the jury that H.B.&T was acting as Respondent's agent and the evidence was such to require the Court to hold that H.B.&T. was, as a matter of law, an independent contractor on the occasion in question.

Petitioner's contention that the H.B.&T. was acting as Respondent's agent on the occasion in question is not sound. In *Cimorelli v. New York Central Railway Company* (Ct. Appeals, 6th Cir., 1945), 148 F. 2d 575, the Court stated the applicable question in cases of this nature, to be as follows:

> "Whether Appellee, (the Railway Company) for whom the work was being done, had given up its proprietorship of the particular business to the Duffy Construction Company and had thus divested itself of the right of control, to the extent that it had no longer a legal right to terminate the work or direct it?"

The Court, in the *Cimorelli Case*, went further and set out certain tests by which the answer to the above question could be determined. The Court stated the following to be the tests.

"One of the tests is who has the right of control over the work being done. Other recognized tests are the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price, the independent nature of the contractor's business, his employment of assistants with the right to supervise their activities, his obligation to furnish necessary tools, supplies, and materials, his right to control the progress of the work except as to final results, the time for which the workmen are employed, the method of payment, whether by time or job, and whether the work is part of the regular business of the employer. The important test is the control over the details of the work reserved by the employer and to what extent the person doing the work is in fact independent in its performance."

These are substantially the same tests as set forth in the other cases cited, supra. In the *Moleton Case, Supra,* the Court stated the tests in the following words:

"The Court has considered five elements in determining the question:

(1) the selection and employment of the servant;
(2) the payment of his wages;
(3) the power to discharge the servant;
(4) the power to control his action; and
(5) the person whose work is being done by the servant. Murray v. Wasatch Grading Co., 73 Utah 430, 274 P. 940.

The first four of these, clearly, under the facts of the present case, point to the express company as the responsible employer. As to the fifth, we believe, in this case, that the express company was the one whose work was being done. Of course, the railroad will ultimately benefit from it, but we do not believe that anyone concerned thought the railroad was performing the services, and merely took on the express company for the purpose of acquiring the use of their

employees. It is, in a sense, a specialized service which has been recognized as such for years."

We respectfully ask the Court to compare the facts in the instant case with the tests laid down in the *Moleton Case, Supra.* Here the H.B.&T. had the right to select and employ the switchmen. Likewise, here the H.B.&T. paid the switchmen, had the right to discharge them, the power to control them, and the switchmen were doing the work of the H.B.&T. The switching of cars was the object for which the H.B.&T. was incorporated, and the switchmen in switching the car in question, were performing, for the H.B.& T., the very function for which it was incorporated.

Also, we ask the Court to compare the facts in the instant case with the tests set out in the *Cimorelli Case, Supra.* In the instant case the H.B.&T. had the right of control. It was the right of H.B.&T. to furnish what personnel it thought necessary, what tools and machinery it thought necessary. Also, the H.B.& T. was paid by the job. The amount of remuneration received by it depended upon the number of cars it handled for Respondent. Certainly this is consistent with an independent contractor relationship.

The *Cimorelli Case, Supra,* also stated one of the tests to be whether the work is part of the regular business of the employer. We have demonstrated in the preceding pages of this brief that the switching of railroad cars in larger cities has for many years been done by Terminal Companies. See *Ft. Worth Belt Railway Co. v. U. S., Supra* (22 F. 2d 795) and *Terminal Railway Ass'n. v. U. S., Supra* (266 U.S. 18, 69 L. Ed. 150). This fact is further shown by the testimony of the witness Magee, regarding classification of Railroad Companies by the Interstate Com-

merce Commission and by the provisions of Vernon's Annotated Civil Statutes (Art. 6549 and Sections 67 and 72 of Article 1302), authorizing the creation of corporations for this very purpose. These factors certainly show that switching in the larger cities, like furnishing and servicing refrigerator cars *(Moleton v. Union Pac., Supra)*, "is, in a sense, a specialized service which has been recognized as such for years." Thus, the H.B.&T., in switching the car in question, was not performing a part of Respondent's work.

As the Court of Civil Appeals points out in its opinion, the H.B.&T. owns the switch yards and terminal facilities where the accident in question occurred (R. 54), employs, pays, disciplines, and discharges its own employees, and determines the claims of said employees, and has made contracts with the various Unions concerning its employees (R. 56, 57 and 99), owns and leases locomotives and other equipment necessary for its business (R. 55), employs a Purchasing Agent, and makes purchases pursuant to authority given by its Executive Committee, which is made up of some of the members of its Board of Directors (R. 55). The principal part of the H.B.&T.s business is to switch cars, both for its proprietary lines and for other lines using its facilities, and all this it does with its own equipment, operated and directed by its own employees.

The evidence in this case certainly meets all the tests set out by the Court in the *Cimorelli Case, Supra.* Neither Respondent, nor any of its employees had the right to control or direct the switching crew in question. The contract provided:

> "The Terminal Company shall have the *exclusive management and control* of the *operation, maintenance,*

> *repair* and *renewal* of the Terminal facilities and every part thereof, and shall establish rules and regulations governing the operation of trains within and upon the Terminal Facilities . . . The railway companies agree to comply and cause their employees to comply with such rules and regulations." (R. 59)

Clearly, this excerpt which provides that the H.B.&T., and only the H.B.&T., shall have control of the operation of the Terminal, negatives any idea that Respondent had any control whatsoever over the Terminal operations.

The evidence cited by Petitioner as supporting the jury's agency finding, wholly fails to support such finding. The fact that Respondent owned 50% of the Capital Stock, elected four (4) of its Directors and represented to the Interstate Commerce Commission that it and the other Stockholders "jointly controlled" the Belt, is no evidence of the type of control required to show agency. *Pullman's Palace Car Company v. Missouri Pacific Railway Company*, 29 L. Ed. 499, 502. The Stockholders of every company jointly control the company and elect the Board of Directors. Yet such joint control does not make the corporation the agent of each stockholder. The provision of the contract, whereby the railway companies could request the H.B.&T. to discharge an employee who was unfit to perform his duties, is a reasonable provision *(Friedman v. Vandalia Railroad Company* (Ct. App., 1918), (254 F. 292). It is the Belt, not Respondent, who can discharge the employee, and then only after a hearing. (R. 61).

While Respondent may have objected to the H.B.&T. switching cars that came into Houston over the lines of the Texas & New Orleans Railroad Company, there is no evidence that the H.B.&T. refused to switch such cars. The only evidence is that the H.B.&T. would require

payment from the consignee of the switching charges. In fact the H.B.&T. did switch cars for the Texas and New Orleans Railroad Company. (R. 55). The H.B.&T. was not depriving itself of anything, since payment from the consignee was as good as payment from the Texas & New Orleans Railroad Company.

The use by the Interstate Commerce Commission of the word "agent" in its approval of the contract which went into effect in 1950, subsequent to the date of the accident in question, is of no probative value on this issue. The word "agent" is often used to describe independent contractor relationships. *Gaulden v. Southern Pac. Co.* (D.C., 1948), 78 F. Supp. 651, aff'd. 174 F. 2d 1022. It is clear from the excerpt, that the Commission was not concerned with the issue at hand. It made no reference to the traditional tests. Indeed, the Commission does not concern itself with the point at hand. The Commission may have been thinking of an agency relationship within the meaning of the Carmack Amendment (49 U.S.C.A., Sec. 20), where each carrier is the agent of the initial carrier. *Galveston H. & S. A. Ry. Co. v. American Grocery Company* (1931), 36 S.W. 2d 985, 992. But the Federal Employers Liability Act did not use the word "agent" in that sense. It used the word in the conventional sense. *Hull v. Philadelphia & Reading Railway Co., Supra.* The argument on Page 18 of Petitioner's brief that Respondent and the other companies which owned stock in the H.B.&T. "jointly controlled" the Belt is fallacious. That argument can be used to make every corporation the agent of any of its stockholders. If A owns one share of stock of General Motors Corporation, A and the other stockholders of General Motors jointly control General Motors. To hold that such control constituted General Motors the agent of its stockholders would be to completely rewrite

the law of agency. The only control Repondent and the other companies had in the instant case over the Belt was the legitimate control every shareholder has over a corporation in which he owns stock. That was the only representation made to the Interstate Commerce Commission (R. 48). This Control does not give the shareholder control of the day to day operation of the company and does not make the corporation the agent of the stckholder. *Pullman's Palace Car Company v. Missouri Pacific Railroad Company*, 29 L.E.D. 499.

Petitioner's argument at the top of Page 19 of his brief that the Belt was wholly incapable of any independent existence is a mere conclusion on the part of petitioner, which is wholly unwarranted.

Conclusion

The intent of Congress is plain. In order to hold the carrier liable for injuries to its employees, the carrier or its agent or employees, must have been negligent. The negligent act in the instant case was the act of the H.B. &T., and the H.B.&T. only. The fact that Petitioner chose not to sue the H.B.&T. should not create liability on the part of Respondent.

Respectfully submitted,

ROY L. ARTERBURY

Walter F. Woodul

WALTER F. WOODUL
1828 Bank of the Southwest Bldg
Houston 2, Texas

PALMER HUTCHESON, JR.
Esperson Bldg.
Houston 2, Texas